The H. P. Townsend Manufacturing Co., Inc., a subsidiary of Comtec, Inc.; TCE Corporation; MT Assembly Corporation; Kimberly P. Barrett, Richard B. Barrett, and David M. Somers *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 281, AFL–CIO. Cases 34–CA–4196, 34–CA–4913, 34–CA–5099, and 34–CA–5661

July 20, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On February 24, 1995, Administrative Law Judge Wallace H. Nations issued the attached decision. Respondents TCE Corporation, MT Assembly Corporation, Richard Barrett, and Kimberly Barrett filed exceptions and a supporting brief, and the General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified by this decision and to adopt the recommended Order as modified.

Respondent David M. Somers is a former National Labor Relations Board attorney, and is knowledgeable about Board law and procedures. The judge found, prima facie, that Somers used his knowledge to attempt to circumvent the National Labor Relations Act, and that he suborned perjury to further that attempt.[2] Further, Somers chose not to appear in this proceeding, though subpoenaed to appear and named as a Respondent. We agree with Judge Nations' findings.

We also agree that a strong prima facie case of aggravated misconduct has been established. We shall not order Somers, however, to defend against the allegations. The Board's current Rules and Regulations (Board's Rules) preclude our adoption of the judge's recommendation that Somers show cause why he should not be permanently barred from practicing law before the Board. The Board's Rules governing attorney misconduct in the context of unfair labor practice proceedings are set forth in pertinent part as follows:

> Sec. 102.44 *Misconduct at hearing before an administrative law judge or the Board; refusal of witness to answer questions*.—(a) Misconduct *at any hearing* before an administrative law judge or before the Board shall be ground for summary exclusion from the hearing.
>
> (b) *Such* misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing. [Emphasis added.]

Thus, the Board's Rules specifically apply only to attorney misconduct of an aggravated character that occurs at a hearing. Because Somers' conduct occurred at the prehearing stage of the proceedings, it is outside the reach of Section 102.44.[3]

In our view, this case highlights a need to reexamine this aspect of our Rules. In order to deal with the alleged misconduct in this case, however, we shall transmit a certified copy of the record in this case to the State bar association for each State in which Somers is admitted to practice, with our request for appropriate disciplinary action if deemed warranted.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, the H. P. Townsend Manufacturing Co., Inc., a subsidiary of Comtec, Inc.; TCE Corporation; MT Assembly Corporation; Kimberly P. Barrett, Richard B. Barrett, and David M. Somers, West Hartford, Connecticut, its their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Eliminate paragraph 2(i).

2. Substitute the attached notice for that of the administrative law judge.

[1] Respondents TCE Corporation, MT Assembly Corporation, Kimberly P. Barrett, and Richard B. Barrett have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There was no ultimate finding on these points because Somers was not on notice of the allegations.

[3] The conduct occurred during the precomplaint investigation. The deposition was taken in response to an investigative subpoena.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to recognize the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 281, AFL–CIO as the exclusive representative of our employees in the appropriate unit:

All production and maintenance employees employed at our West Hartford, Connecticut facility but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT fail and refuse to abide by the terms and conditions of employment for our unit employees as set forth in the last collective-bargaining agreement between the Union and H. P. Townsend Manufacturing Co., Inc., as found in the National Labor Relations Board Decision and Order in Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099.

WE WILL NOT coercively interrogate our employees about their union activities or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on demand, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees and if agreement is reached, embody the agreement in a new collective-bargaining agreement.

WE WILL rescind any unilateral changes made in the terms and conditions of employment from those set forth in the last collective-bargaining agreement between the Union and H. P. Townsend Manufacturing Co., Inc., and reinstate those terms and conditions of employment with respect to current unit employees.

WE WILL make whole those unit employees employed since the operations of TCE Corporation and MT Assembly Corporation commenced about October 22, 1991, for any losses they may have suffered by our failure and refusal to abide by the terms of former collective-bargaining agreement.

WE WILL pay to the Union the pension fund obligation for the involved individuals as set forth in the compliance specification in National Labor Relations Board Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099, with interest.

WE WILL pay to the Board and the Union all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this proceeding.

TCE CORPORATION, MT ASSEMBLY CORPORATION

William E. O'Connor, Esq., for the General Counsel.

Patricia M. Strong and *Elaine Stuhlman, Esqs*., of Wethersfield, Connecticut, for Respondents TCE Corporation, MT Assembly Corporation, Richard Barrett, and Kimberly Barrett.

Robert Patti, Representative, of Chicopee, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on charges filed by the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 281, AFL–CIO (the Union) in Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099 against the H. P. Townsend Manufacturing Co., Inc. (Townsend), complaints issued alleging that Townsend had committed a variety of unfair labor practices, including, inter alia, failing to make pension fund payments. A hearing was held on September 23, 1991, and a decision (G.C. Exh. 1(q)) issued on November 1, 1991, finding against H. P. Townsend on all allegations. On December 16, 1991, the Board issued its Order adopting the administrative law judge's findings, conclusions, and recommended Order.

On April 22, 1992, the Union filed a charge in Case 34–CA–5661 alleging that TCE Corporation (TCE) violated the Act by, inter alia, refusing to recognize and bargain with the Union and refusing to recall union members from layoff. On June 5, 1992, the Union filed an amended charge alleging that Townsend, TCE, MT Assembly Corporation (MT Assembly), Kimberly P. Barrett, and Richard B. Barrett had violated the Act by, inter alia, refusing to recognize and bargain with the Union, and by unilaterally changing layoff and recall procedures. On September 21, 1993, the Union filed a second amended charge that named the same entities and persons as the first amended charge, and alleged that they had violated the Act by, inter alia, failing to continue in full force and effect all the terms and conditions of the most recent collective-bargaining agreement (agreement) between the Union and Townsend. A complaint and notice of hearing issued in Case 34–CA–5661 on September 23, 1993, alleging, inter alia, that MT Assembly and TCE constitute an alter ego and single employer (TCE/MT). The complaint pled that TCE/MT was a successor employer to Townsend, and was unlawfully refusing to recognize and bargain with the Union as the collective-bargaining representative of their production and maintenance employees at the Townsend facility (facility) located in West Hartford, Connecticut.

In the alternative, the complaint pled that Townsend, Richard Barrett, and Kimberly Barrett established TCE/MT as a disguised continuance of Townsend and they all collectively

constitute a single employer and alter egos, and violated the Act by, inter alia, refusing to apply the agreement to their employees at the facility.

On October 26, 1993, a compliance specification and notice of hearing issued in Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099 alleging, inter alia, TCE/MT constituted a single employer and alter ego, and was liable as a successor for the unfair labor practices of Townsend. In the alternative the compliance specification alleged that all the parties named above constitute a single employer and alter egos, and are jointly and severally liable for the Townsend unfair labor practices. An order consolidating cases issued on October 26, 1993, which consolidated those cases for hearing. The date of the hearing was rescheduled three times. On October 21, 1994, the Union filed a third amended charge including David Somers as an alter ego with the others already named. Hearing opened on October 24, 1994, and both the complaint and compliance specifications were orally amended at hearing to name Somers as an alter ego. The hearing was adjourned to November 8, 1994, in order to give Somers the opportunity to prepare his defense, and was then conducted from November 8 through 11, 1994.

Somers, who acted as attorney for Townsend, TCE/MT, and the Barretts during most of the history of this proceeding, refused to appear at trial despite the fact that he was subpoenaed to appear, and despite notice given to him about the amendments to the complaint and compliance specification made at trial to include him as alter ego Respondent. It is to be noted that not only was he notified in advance of the October 24, 1994 hearing of the proposed amendments, but his attorney, Mark Dean, was present at the hearing when these amendments were allowed. I specifically instructed Dean to inform Somers of the allowed amendments and directed the counsel for the General Counsel to serve Somers otherwise. Attorney Dean stated that he would so inform Somers, but declined to accept service for Somers. Dean was also notified that Somers' motion to quash the subpoena directing Somers' appearance was overruled and Somers was directed to appear at the continued hearing on November 8, 1994. It was made clear that Somers would be allowed to reassert the attorney client privilege with respect to the material subpoenaed on an item-by-item basis at this hearing.

Since the date of hearing, Somers has attempted to create a false impression that he was not notified of the amendments, and that the lack of notice was not his fault. In this regard, he submitted a letter dated December 6, 1994, in which he notes he has filed a complaint with the State of Connecticut, judicial department, against National Labor Relations Board Region 34 Regional Director Peter Hoffman, Regional Attorney Jonathan Kriesberg, and counsel for the General Counsel William O'Connor. This complaint, dated November 7, 1994, notes the existence of the charge filed against him by the Charging Party on October 21, 1994, and admits he was faxed a copy of the charge by counsel for the General Counsel on that date. A cover letter included in this fax clearly states that the complaint would be amended to name Somers as an individual Respondent. The complaint also admits Somers knowledge of the events at the hearing held October 24, 1994, including the amendment of the consolidated complaint to name him as an additional Respondent. The complaint further acknowledges that Attorney O'Connor personally served a copy of the charge on Somers on November 4, 1994.

Somers, in his December 6, 1994 letter, asserts that he was given no notice of the continued hearing until November 19, 1994. This is of course contradicted by his own complaint wherein he admits knowledge of the events of October 24, 1994, and personal service on November 4, 1994, of an October 24, 1994 letter from O'Connor that states:

> Please find enclosed a copy of the Third Amended Charge in Case 34–CA–5661. The hearing in the above-referenced cases began on October 24, 1994 as scheduled. The Administrative Law Judge granted by motion to admit the Third Amended Charge, and to amend both the Compliance Specification and the Complaint at issue in the above referenced cases to include you as a named Respondent and alter ego of the other named Respondents. He also ruled that you should appear at the hearing, which has been adjourned until November 8, 1994, at 10 a.m. with the records which had been subpoenaed from you, and which you failed to produce on October 24, 1994, as requested.

Although acknowledging personal service of the foregoing, Somers claims that a copy of this letter that was mailed to him by O'Connor was not received until November 19, 1994, because it was mailed to the wrong address, asserting he receives his mail only at a post office box. The certified envelope that was filed as General Counsel's Exhibit 96 shows that exact same address and post office box, however, as the letterhead on Somers' December 6 letter, and is the exact same address to which communications to Somers are always sent. It is to be noted that the subpoena that Somers acknowledged receiving was also sent to this address.

I find that Somers' claim that he was not properly notified of the amendments concerning himself is meritless and that he willfully let this case against him proceed. See *Western Paper Products*, 313 NLRB 94 (1993); *Plumbers Local 250 (Murphy Bros.)*, 311 NLRB 491, 496 (1983).

Somers' claim that the amendment should be barred because of Section 10(b) is also meritless. He was a participant in the investigation of all charges at issue and was plainly aware of their substance. He was given the opportunity to defend himself against the charge that he was an alter ego. He chose not to defend himself. It is well established that the alter ego need only be given the opportunity to litigate alter ego status before being held liable for the unlawful acts of the other alter egos. See *Southeastern Envelope Co.*, 246 NLRB 429 (1979). Furthermore, as will be dealt with in more detail later, it was Somers' condoning of and direction of perjury that hid the facts of his own involvement as alter ego in the case that caused any delay in naming him as defendant. Such fraudulent concealment tolls Section 10(b). See *O'Neill Ltd.*, 288 NLRB 1354 (1988).

Briefs were received from the General Counsel and Respondents TCE/MT, Richard Barrett, and Kimberly Barrett on or about December 16, 1994. Another letter was received from Respondent David Somers on December 16, 1994. Although no answer was filed to the amended complaint and compliance specifications by Somers, I accept his letter as his answer to the these pleadings and his brief on his legal position in these proceedings. Based on the entire record in

this proceeding, including my observation of the demeanor of the witnesses, and after review of the briefs and Somers' letters, I make the following

FINDINGS OF FACT

I. JURISDICTION

At the hearing, the parties entered into the following stipulations:

> (a) During the 12 month period ending August 31, 1993, Respondent TCE Corp., in conducting its business operations, sold and shipped from the West Hartford, facility goods valued in excess of $50,000 directly to points outside the State of Connecticut; (b) During the 12 month period ending August 31, 1993, Respondent M.T. Assembly Corp., in conducting its business operations, provided over $50,000 worth of services directly to TCE Corporation; (c) Respondent M. T. Assembly Corp. has provided no services to any customer other than TCE Corporation; and (d) All the finished machines sold by TCE Corporation to customers were assembled by employees of M.T. Assembly Corp.

Based on the Board's Order of December 16, 1991, adopting the administrative law judge's decision of November 1, 1991, I find that at all times material until August 1, 1991, when it ceased business, Respondent H. P. Townsend, a corporation with an office and place of business in West Hartford, Connecticut, was engaged in the manufacture and nonretail sale and distribution of riveting machines and related products, and was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the stipulations set out above and the evidence of record, I find that Respondents TCE Corporation and MT Assembly Corporation, both corporations with an office and place of business in West Hartford, Connecticut, have engaged in the manufacture and nonretail sale and distribution of riveting machines and related products, and have at all material times been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[1]

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The allegations of the compliance specification against H. P. Townsend were denied by the Respondents. No evidence was offered to dispute the accuracy of its calculations, however, which were based on reports supplied by Richard Barrett to the Union's pension funds. I therefore find that Respondent Townsend owes $36,721.43 plus interest, for its failure to make the pension fund payments during the period September 1, 1988, through August 1, 1991. The amounts payable to individual employee accounts is as set forth in Appendix A to the compliance specification, which appendix is incorporated herein by reference. Still in dispute are the complaint allegations that allege:

1. That Respondents TCE and MT Assembly are alter egos and a single employer within the meaning of the Act.

2. That Respondents TCE and MT Assembly were established as a disguised continuance of Respondent H. P. Townsend by Townsend, and Respondents, Richard Barrett, Kimberly Barrett, and David Somers, and that all named Respondents are alter egos and a single employer within the meaning of the Act.

3. That Respondent and single employer TCE/MT is a successor employer to H. P. Townsend.

4. That since about November 1, 1991, Respondents have failed to recognize and bargain in good faith with the Union as the representative of their employees in the appropriate unit, and have failed to continue in force and effect the collective-bargaining agreement between the Union and Townsend, which agreement was effective from October 26, 1987, through October 25, 1990.

5. That about June 2, 1992, Respondent TCE/MT, by Steve Giannini during a telephone conversation, interrogated its employees regarding their union activities.

A. *The History of the Involved Companies as it Relates to the Issues for Determination*

Townsend was engaged in the manufacture and nonretail sale of riveting machines and related equipment. It was located in West Hartford, Connecticut, and was a wholly owned subsidiary of Comtec,[2] which was itself a holding company wholly owned by Commercial Technology, Inc., which is located in Dallas, Texas.

Townsend began in about 1907 and gradually grew until 1952 when it acquired the Cleveland Tapping Machine Company. In the mid-1960's Townsend acquired ERCO, the Engineering and Research Company. That was the structure of the company in June 1973, when Richard Barrett was hired as an employee. He was never an owner of the company. In 1980, Comtec, Inc. was formed, coincident with the acquisition of an aircraft parts manufacturing company called Electro Machine and Tool (EMT) located in Bristol, Connecticut. At the time Comtec was formed, it also owned the National Automatic Products Company (NAPCO) located in Berlin, Connecticut, and the VALCO Manufacturing and Engineering Company, located in Bloomfield, Connecticut.

The only one of the Comtec companies that was ever unionized was Townsend. The Union was the representative of a unit of Townsend employees since at least 1952. In 1973, when Richard Barrett began working at Townsend, there were 35–37 members in the bargaining unit, out of a total employee complement of 50–55.

The Comtec companies, except VALCO, did well until the 1982–1983 period when sales began to decline. VALCO was always in poor financial condition since it was acquired. In 1987, a products liability case again NAPCO settled for $950,000, which resulted in a blanket-security agreement in the amount of $635,000 against all Comtec companies, including Townsend. The NAPCO company closed in November 1989 by a court ordered replevin of its assets. Its real estate in Berlin was abandoned by its creditors and, although a foreclosure was started by the Town of Berlin, title was never taken in that case or in any other action by creditors.

[1] Respondent TCE Corporation and MT Assembly Corporation have held this status since October 9, 1991.

[2] The administrative law judge found that H. P. Townsend and Comtec, Inc. constituted a single employer.

The VALCO company closed on December 1, 1989, in a peaceful possession agreement with its secured creditor, Connecticut National Bank (CNB), then reopened briefly for the purpose of organizing for an auction of its assets in June 1990. Its real estate in Bloomfield was abandoned similar to the Berlin property abandoned by NAPCO.

The EMT company's two buildings in Bristol were sold in 1988 and 1989 to partially satisfy the CNB debt. EMT moved to West Hartford to share the building with Townsend, which had compressed its operations into half of the building after selling some of its machinery and equipment in 1988. Approximately one-third of Townsend's property was sold at auction in June 1990 to partially satisfy the CNB debt. During the period of time from 1988–1990, every effort was being made to satisfy CNB to avoid the complete closure of the companies.

Richard Barrett was controller of Townsend from June 1973 through December 1989. In December 1986 he also became vice president. On December 29, 1989, he became both president and treasurer of Townsend. His daughter, Kimberly Barrett, was made corporate secretary of Townsend from January 1990 through May 26, 1991.[3] Townsend's chairman of the board was Mort Zimmerman, who was also president of commercial technologies and owner of all involved companies. Richard Barrett was controller and vice president when Townsend stopped making pension fund payments. He was president and treasurer during the period of all the other unfair labor practices committed by Townsend, which included the continuing refusal to make pension fund payments, unilaterally changing medical plans, and unilaterally implementing a new collective-bargaining agreement.

In June 1990, while he was refusing to make payments to the union pension plan, because Townsend allegedly could not afford to make such payment, Richard Barrett raised his own salary from about $42,000 per year to $56,000 per year. During the same period, David Somers was hired to represent Townsend and Comtec, Inc. Between January 1990 and the closure of Townsend on August 1, 1991, Somers was paid approximately $125,000 to $150,000 in legal fees. Somers was advising Barrett and Zimmerman on various matters, including the debt restructuring negotiations with CNB and the labor negotiations in the fall of 1990 with the Union. The collective-bargaining agreement with the Union expired on October 25, 1990, and the parties failed to reach an agreement on a new contract. Somers' integral role in the bargaining sessions and events involved in the unfair labor practices previously litigated is apparent from reviewing the decision.

In the last year of its operation, Townsend had only 10 or 11 employees, 3 of whom were bargaining unit members. It is undisputed that Townsend and its related sister companies owned by Comtec were in serious financial difficulties at the time Richard Barrett became president of each. In early 1991 CNB was putting significant pressure on Townsend to pay outstanding debts. CNB notified Zimmerman on March 19, 1991, that unless Townsend agreed to its last forbearance proposal, it would seek liquidation of Townsend's assets. Townsend refused. In fact, CNB seized those assets pursuant to a court order and a sheriff closed the facility on August 1, 1991. At this time all employees were laid off.[4]

B. *The Board's Decision in Cases 34–CA–4196, 34–CA–5099, and 34–CA–4913*

A hearing was held in these three proceedings against Townsend and Comtec on September 23, 1991. As noted in the administrative law judge decision, issued November 1, 1991, no appearance was made by H. P. Townsend or Comtec. A letter dated September 9, 1991, from Somers stated that his office withdrew its appearance for the Respondents and that Respondent would not appear at the hearing or respond to subpoenas. It further stated that all Connecticut Comtec companies, including Townsend, had ceased operations involuntarily because of creditors' actions. Somers further noted that Employer Official Sal Barone had resigned from his corporate position and that Richard Barrett would be resigning before the hearing.

The administrative law judge decision found that Townsend was an employer within the meaning of the Act and Townsend and Comtec were a single employer within the meaning of the Act. It further found that Respondent violated the Act, inter alia, by failing to make contributions to the union pension plan, by changing health benefits, sickness and accident benefits, and life insurance benefits, and by unlawfully implementing its proposed collective-bargaining agreement and failing to abide by the terms of the expired collective-bargaining agreement.

No exceptions were filed to this decision and it was adopted by the Board in an Order dated December 16, 1991. A default judgment was later entered by the United States Court of Appeals for the Second Circuit on July 15, 1992.

C. *Formation of TCE and MT Assembly*

In late January or early February 1991,[5] Somers and Richard Barrett began to discuss how to continue business should CNB seize the Townsend assets.[6] Barrett had earlier suggested to Union Representative Robert Patti during negotiations that he, Somers, and Vice President Sal Barone were interested in gaining the Townsend operations for themselves. Somers suggested that a new corporation could be formed, but they felt that Barrett should not be listed as an officer because of his outstanding liabilities.[7] Somers first suggested that Vice President Barone be the president of the new corporation, but Barone consulted an outside attorney

[3] Although Kimberly Barrett's position would denote some degree of authority with respect to Townsend's operation, there are no facts to demonstrate that she held any authority with this Respondent whatsoever.

[4] Although CNB had replevied the personal property of the companies, there remained a very large debt of roughly $1.3 million. In addition there was the $635,000 lien from the NAPCO judgment. Unpaid real estate taxes to the various towns also encumbered the real estate assets remaining to the Comtec companies. The liquidation value of the replevied Townsend machinery and equipment was approximately $35,000 according to an outside appraiser.

[5] All dates hereinafter are in 1991 unless otherwise noted.

[6] Hereinafter, Richard Barrett will be referred to as Barrett. All other Barretts involved will be referred to by their full names.

[7] Barrett, as well as Zimmerman, are personally subject to an IRS lien of approximately $500,000. I would agree that such a lien makes Barrett an unlikely candidate for an ownership interest in the new Company, but I believe the decision not to make him an officer had more to do with disguising his position of control with it. He was named as a director.

who apparently advised him not to participate. When Barone announced his decision sometime in May, Somers suggested that they name Barrett's 11-year-old son as president, but Barrett suggested they use his 21-year-old daughter Kimberly Barrett instead.[8]

Kimberly Barrett resigned as Townsend's corporate secretary in late May. Somers proposed that the Barretts purchase the Townsend assets through a ''straw person'' in order to avoid claims that the new company was responsible as a successor for Townsend's debts, including its union obligations.[9] Somers suggested that they use his office manager and girlfriend, Gigette Coudriet,[10] as the straw person, that she be named as corporate secretary of the new corporation and be paid $300 per month for that position. During the same time period, Somers introduced the Barretts to Rhonda Farrah, who was president of the Small Business Institute (SBI), and Robert Fradette, who worked with Farrah. SBI proposed to give a $500,000 loan in foreign funding to the new corporation in exchange for a $5000 due diligence fee. SBI required that Farrah and Fradette be named as directors of, and that Richard Barrett sign an employment contract with, the new corporation. When Farrah sent a letter dated May 29, formally making its offer, she apparently thought the name of the new company would be ''TCE Corporation.'' The Barretts chose, however, to use the name ''TECCO, Inc.'' when Kimberly Barrett returned the application to SBI. Somers directed Coudriet in the preparation of the corporate papers that were filed on an expedited basis on June 5. The State rejected the corporate application, however, because the name had apparently been taken, so they prepared new corporation papers using the name TCE Corporation. TCE was an acronym for the Townsend product lines: Townsend, Cleveland, and ERCO.

SBI gave the Barretts until June 4 to make their application. Richard Barrett asked for, and received from his mother, $4000 in order to apply for the loan. He presumably contributed some money, but both he and Kimberly Barrett were unable, or unwilling, to state where the additional $1000 came from. No record was ever kept of this debt.

In support of her application to SBI, Kimberly Barrett submitted on or about July 15, a detailed business plan that clearly shows that the purpose of the new corporation was to utilize the Townsend assets though the CNB replevin action.[11] Although the articles of incorporation stated that TCE had $1000 in capital, this was not true. Kimberly Barrett in fact opened a bank account on July 17, and deposited $300 from personal savings.

Meanwhile, CNB continued with its replevin action. In July a hearing was held on its request for a prejudgment remedy. Although Somers appeared with Richard Barrett, he did not offer a defense. The state court granted the replevin request on July 29, and the facility was closed on August 1. Although the remaining production and maintenance employees were laid off, Richard Barrett secured access to the facility from CNB for himself, a number of Townsend employees, and David Somers, in order to maintain accounts and preserve the value of the assets seized by CNB. This is important because as Barrett and Somers were ostensibly acting on behalf of their employer Townsend, they were actually furthering the scheme to acquire the assets for TCE/MT.

In furtherance of their desire to create an aura of an ''arms-length relationship'' with the straw person, Kimberly Barrett under Somer's direction sent a letter, dated July 21, to Coudriet requesting her ''assistance in locating and acquiring assets for TCE.'' No mention was made of Townsend's assets in the letter, though such assets were clearly her target as set forth in the July 15 business plan submitted to SBI.

CNB put up the Townsend assets for sealed bid. Because SBI had not yet produced the loan requested, the parties needed another source of funds. The Barretts asked Somers if he wanted direct ownership interest, but he declined. Somers explained to Coudriet that it was not in his interest to purchase the assets himself. He did, however, agree to help fund the purchase through Coudriet. Richard Barrett once again approached his mother for the remaining funds. The bid process went through several stages. Coudriet's first bid was not enough so Richard Barrett was forced to go back to his mother for additional funds. Ultimately, Coudriet was awarded the bid for $70,500. Barbara Barrett, Richard Barrett's mother, provided $40,000 while Somers provided the remaining $30,500.

During the bid process, Mort Zimmerman was also engaged in trying to put together a bid for the Townsend assets using a company called ''Glauber Management.'' Although Richard Barrett was actively, but secretly, conspiring with Somers to put in a bid for $70,500, Richard advised Zimmerman that he thought CNB was looking for $60,000.

On September 9, Somers notified the NLRB that he was resigning as attorney for Townsend and Comtec. He stated that Richard Barrett had informed him that he would resign all his corporate positions prior to the unfair labor practice trial scheduled for September 23, and that neither would appear nor respond to the General Counsel's subpoena. Richard Barrett admitted that he was aware of the letter sent by

[8] Kimberly Barrett had just graduated from college and had been unable to find employment. She had absolutely no experience in the operation of a business such as the one contemplated and in my opinion was just used as a tool, though a willing one, to carry out the scheme devised by Barrett and Somers to continue the business of Townsend without being held liable for, inter alia, the unremedied unfair labor practices of Townsend.

[9] On brief, Respondents Richard and Kimberly Barrett urge that the purpose of acquiring the Townsend assets was to insure continued employment for Richard Barrett, his wife, Silvia, and son Danny, both former Townsend employees. It would also provide employment for Kimberly. On the other hand, the brief admits that they went along with the ''convoluted scheme'' created by Somers in order to avoid succeeding to Townsend's liabilities.

[10] The only reason I mention this relationship is because Coudriet used it as justification for her unquestioning willingness to sign any document Somers asked her to sign. I believe that she did participate in the scheme to create TCE and MT simply out of trust for Somers. Otherwise, I would name her as another alter ego as she did benefit financially from the scheme.

[11] The document, inter alia, states:

> TCE Corporation was formed as a machine tool sales and engineering consulting company with the possibility of acquiring certain assets necessary for the assembly production of various machine tool product lines. The primary assets required to meet the goals of TCE Corporation will the intellectual properties of successful or formerly successful machine tool building companies in the Northeast. One immediate opportunity for acquisition appears to be the purchase under replevin of the nonreal properties of a well-established, proven company in West Hartford, CT, the H. P. Townsend Manufacturing Co.

Somers, a copy of which was sent to him, but not Zimmerman. Somers also sent a letter to Zimmerman dated September 9, resigning as counsel for all the Comtec companies. Richard Barrett did not, however, notify Zimmerman that he would not attend the hearing on September 23. No one appeared on behalf of Townsend or Comtec at the unfair labor practice hearing held on that date.

When they learned from CNB that their bid had been successful, Kimberly sent another disingenuous letter to Coudriet dated September 12, offering to use those assets, with the apparent purpose of supporting the image of an arm's-length relationship. In fact, the parties entered into a new phase in the creation of the alter ego, as Somers suggested that a second Company be formed to protect the Company from future litigation and to operate in as safe a manner as possible. Richard Barrett explained that the purpose of creating a second Company was to protect the proprietary drawings and other proprietary interests of Townsend, which had been leased and/or to TCE, from ''frivolous claims.'' In other forums the Barretts have acknowledged that the purpose of the second corporation was to avoid liability to the Union and its employees.[12]

The Barretts chose the name MT Assembly Corporation for the second Company. The incorporation papers were prepared in Somers' office. Kimberly Barrett was named president and chairman of the board, while Coudriet was named as secretary. Richard Barrett, Rhonda Farrah, and Robert Fradette were named as directors. Somers suggested that Coudriet be paid $100 per month as corporate secretary of MT Assembly.[13]

CNB formally conveyed the former Townsend assets to Coudriet on October 8. The day before, October 7, Kimberly and Richard Barrett met a number of former Townsend employees at the facility to ''interview'' them for the new companies. The former Townsend Production and Maintenance Supervisor Stephen Giannini was hired as ''shop superintendent,'' and was placed on both TCE and MT assembly payrolls. He was called ''inventory supervisor'' for TCE. They hired former Townsend employee Robert Hartman as purchasing and materials manager and customer service representative, and he was also put on both payrolls.[14] They hired Joanne Pappas as bookkeeper and office manager, and Silvia Barrett, Richard's wife and Kimberly's mother, as receptionist. Both performed similar duties for Townsend. Al Levesque, a former Townsend engineer was hired as engineering manager. Pappas, Silvia Barrett, and Levesque were each on TCE's payroll. Only one employee was hired for TCE/MT initially who had not been on Townsend's payroll. That was Donald Dodd, a draftsman employed by TCE.

On October 9, the parties met to complete the deal. Somers drafted a number of documents that were signed simultaneously in Somer's office. Kimberly and Richard Barrett, Somers, and Coudriet were present. At that time, Coudriet sold some of the Townsend assets to TCE, and some to MT Assembly, while leasing certain other assets to each. Coudriet was to receive $450 per month for the TCE lease and $200 per month for the MT Assembly lease. In return for the sale of assets, Kimberly signed, on behalf of TCE and MT Assembly, two promissory notes for $65,000 and $8000, respectively, to Coudriet. The notes required that interest be paid at the rate of 12 percent.

At that same meeting, Richard Barrett, acting as president of Townsend, conveyed rent-free 3-year leases for the use of the West Hartford facility to both TCE and MT Assembly. Townsend received no payments of any kind for those leases. In fact, Townsend remained responsible for the real estate taxes. Richard Barrett has not informed Zimmerman or anyone from Commercial Technologies about these leases.

On October 9, Coudriet also executed two promissory notes, one to Barbara Barrett and one to Somers reflecting the amount they had put up for the purchase of the Townsend assets from CNB. Each note called for 12-percent interest payments to be made.

D. *TCE and MT Assembly Begin Operations*

Operations began almost immediately. Giannini recommended to Richard Barrett that former Townsend production and maintenance employees Anthony Mastan and Jerzy Mroczek be hired, and they were placed on MT Assembly's payroll.[15] The Barretts also hired Richard Barrett's stepson, Danny Barrett, who is also on the MT Assembly payroll, to begin immediate cleanup work. He too had been a former Townsend employee.

The last remaining act to complete the plan was Richard Barrett's resignation from Townsend and the other Comtec companies on October 18. On October 21, Richard and Kimberly Barrett signed two business consultant agreements, for TCE and MT Assembly respectively. Although neither agreement called for a salary figure, it was understood that Richard Barrett would receive $1185 per week from TCE and would defer $200 per week from MT Assembly. Richard explained at trial that Somers advised that it would not be in

[12] Although Richard Barrett tried to claim that they wanted to protect the proprietary interests from product liability suits, that explanation makes no sense at all. Even if the products sold by TCE were manufactured by another Company from the TCE proprietary drawing, TCE would be unable to escape product liability. In state court pleadings, the Barretts have averred:

> The Plaintiff Attorney, [Somers], citing his expertise as a labor lawyer acquired while employed at the NLRB, advised Barrett and the Defendants, TCE and MT, that the assets must be purchased through his legal secretary, Gigette Coudriet acting as ''straw'' person in order to evade Townsend successorship liability to its employees and other creditors.

After noting all the various leases and notes involved in the scheme, the pleadings state:

> All of the subject documents were drafted solely for the purpose of breaching Townsend's Union Employee Bargaining Agreement, all in violation of the National Labor Relations Act.
>
> Because Townsend ceased operations owing substantial sums of money to its union employees and other creditors, the Plaintiff advised me, as president of TCE and MT, to purchase the Townsend assets through a ''straw person'' to avoid Townsend ''successorship liability.''

[13] As in the case of TCE, Kimberly did not have the $1000 of capital as stated in the articles of incorporation for MT Assembly. It appears that the first deposit placed in MT Assembly's checking account was $100 paid by TCE for Danny Barrett's cleanup work. Danny had also been a unit employee for Townsend.

[14] Shortly before the instant trial, Hartman was taken off the MT Assembly payroll, while Giannini was taken off the TCE payroll.

[15] The spelling of these employees' names varies throughout the record. I have relied on their W–2 forms, set out in G.C. Exh. 59.

the interest of the Company for him to be an officer because of his outstanding obligations.[16]

It is undisputed that all the employees hired by TCE and MT Assembly in 1991, with the exception of a lone draftsman, Donald Dodd, were former Townsend employees. Despite the fact that TCE had no assets when it started, Barrett gave himself, Stephen Giannini, Silvia Barrett, and Joanne Pappas raises to work for TCE and MT Assembly. Richard Barrett's salary for TCE was $100 per week higher than his salary at Townsend. Kimberly was given a salary of $39,000 per year, collectively from TCE and MT Assembly.[17]

The production and maintenance employees were paid different wages from what they had been paid under the agreement. Steven Giannini determined what wages they were paid. The agreement was not followed in any way, including right of recall, wages, or benefits. Giannini also determined which production employees would be recalled. The agreement had called for recall of laid-off employees in order of seniority, provided the employee could perform the job needed. The first production employee recalled was Danny Barrett, whose job was the least skilled as he performed only general maintenance duties, the kind of duties he had at Townsend. Danny Barrett was low on the seniority list. General Machinists Jerzy Mroczek and Anthony Mastan were also recalled in 1991. The production and maintenance employees received no pension benefits and different medical benefits requiring higher deductibles and copayments from employees. Richard Barrett explained that he recalled certain former Townsend employees because the production area was in disarray, and that certain employees had specific knowledge of certain proprietary fixtures and patterns, special tools, and gauges, and they would know where to locate them.

The operations of TCE/MT were identical to those of Townsend. The machines that had been seized in the replevin action had never been moved. All the machines that the production employees worked on were former Townsend machines. Inventory was kept in the same place on the production floor. Richard Barrett continued to occupy the office he had as President of Townsend. He distributed ''News Releases'' to the public informing them that TCE had acquired the Townsend assets, including the Cleveland and ERCO lines and described that ''TCE Corporation has the full capacity to design, build and service and consult with respect to all of the product lines previously offered.'' TCE also published brochures setting forth its product lines, utilizing the logos of the former Townsend lines, and pledging ''to continue to service, upgrade and rebuild existing machines in these lines.'' It used the same telephone as Townsend. The Barretts sent out letters to former customers who had contacts with Townsend in the past. It is undisputed that the assembly work of all machines produced by TCE was performed by MT Assembly production employees, and that MT Assembly performed work for no one but TCE.

Giannini continued in his former role as supervisor of the production employees. All MT Assembly does is provide labor for TCE. All materials are supplied by TCE. The production employees worked on the same machines they had for Townsend. The only difference put forth by Respondents in the working conditions of the former Townsend employees is that Giannini now expects them to be able to perform multiple tasks. Richard Barrett admitted, however, that achieving such flexibility was one of the bargaining proposals he put forth in Townsend's negotiations with the Union, and in my opinion does not represent a significant change in their duties. All office work, including receptionist and answering the telephone, was performed by employees on the TCE payroll. TCE has never been reimbursed by MT Assembly for any services provided, such as clerical employees. Most utility and service costs in operating the facility have been paid by TCE. The main exception is that electrical bills are billed to, and usually paid by, MT Assembly. Neither one has ever reimbursed the other for such costs. Indeed, up until the summer of 1994, shortly before a hearing previously scheduled in this case, no records were kept at all showing that there was any allocation of shared costs between the two corporations.[18]

Even the practice of each corporation paying bills for different accounts was not consistently adhered to. In fact, when MT Assembly's bank account was subject to an action by the IRS, TCE issued a series of checks covering MT Assembly's bills. Similarly, TCE once issued cash to MT Assembly to enable it to pay the production employees salaries.

About November 1991, Machinist and Tool Maker Carmelo Rivera was informed by Tony Mastan that he had gone back to work at the facility. Rivera went to the facility and spoke to Steve Giannini, who told him to fill out an application because it was a ''brand new company.'' In 1992, Giannini called Rivera and said he had one H. D. forming machine to be built and asked Rivera to come in to discuss working if he was interested. At the shop, Giannini informed Rivera that the job would be temporary, he would get paid $10 per hour, there were no benefits and there was no union. Rivera went back to work on March 30, 1992. When Rivera returned, laborer Danny Barrett and machinists Jerry Mroczek, Tony Mastan, and Sal Tralongo were working, performing the same jobs they did at Townsend, as did Rivera.[19]

The record shows that at the time of the Union's demand for recognition on March 31, 1992, four machinist were employed, although one, Rivera, was hired on a temporary basis, and one other unit employee, Danny Barrett, performed maintenance duties. Since that time TCE/MT has hired some additional production employees without regard to seniority rights or the agreement.[20] Thus, at the beginning of operation, all unit employees were former Townsend employees. In March 1992, at the time of the demand for recognition, five of six unit employees were former Townsend

[16] Again no rational explanation has been offered to support this claim, and I find that Richard Barrett was not named an officer solely to avoid the appearance of successorship.

[17] When Kimberly Barrett was questioned about her salary, she was unable to distinguish one salary from the other, saying that her TCE wage represented 70 percent of her total salary.

[18] The documents finally produced are handwritten and appear to be nothing but an attempt shortly before trial to show separateness between the two corporations.

[19] Tralongo was not on the payroll in 1991, but was employed in the first quarter of 1992. He was a former Townsend employee.

[20] The records show that electrical worker Jaime Mangiafico, who was not a former Townsend worker, was employed in 1992. At least three production employees were hired after that—Gerald Nadeau, Ralph Giannini, and Ron LaFrance. LaFrance was another former Townsend employee.

employees and in 1993, five of eight unit employees were former Townsend employees. The record is devoid of any evidence to show that any significant expansion in the size of the unit occurred after the Union's recognition demand or such expansion was even planned.

E. *The Union Becomes Aware of TCE/MT*

Union Representative Patti stopped by the facility in January 1992 and learned that Richard and Kimberly Barrett were conducting a business known as TCE Corporation. A sign outside the facility listed the three Townsend product lines, Townsend, Cleveland, and ERCO. He visited again in February and, on inspection, found that several people were working on production in uniforms. As a result of his findings, he sent a letter dated March 31, 1992, to Richard Barrett requesting bargaining with ''H. P. Townsend Mfg. Co./TCE Corporation.'' Richard Barrett gave it to Kimberly, who in turn gave it to Somers. Somers told her not to worry about it. Somers sent a reply letter to Patti dated April 1, 1992, in which he stated that Richard Barrett was neither a stockholder nor officer of TCE, claimed that TCE was not a successor to Townsend, and therefore declined Patti's request for bargaining. After he filed the charge in Case 34–CA–5661, Patti learned through the Board that Carmelo Rivera had been working at the facility. Local Union President Dennis Hartley visited Rivera at his home in the first week of June and asked him if he had worked for the Company. About an hour after Hartley left, Giannini called Rivera and asked him if the Union knew that he had worked at the Company. Rivera told Giannini he thought the Union did know. Giannini then hung up.[21]

Meanwhile the business continued on, albeit in a troubled state. SBI never delivered on the promised loan, and Kimberly Barrett filed an unsuccessful suit against SBI on behalf of TCE seeking reimbursement of the due diligence fee. Neither TCE nor MT Assembly have posted a profit since operations began. MT Assembly began having IRS problems in late 1992.

F. *A Falling Out Begins Among the Respondents and the True Nature of the Respondents' Scheme Comes to Light*

Pursuant to investigative subpoenas, depositions were taken on February 25, 1993, from Gigette Coudriet and Richard Barrett; and on March 4, 1993, from Richard and Kimberly Barrett. Somers represented each one at the depositions and, according to each of them, counseled them to lie during their testimony. Each followed his advice. The thrust of their perjured testimony was to hide the facts concerning the formation of TCE and MT Assembly. In particular, Coudriet recalled Somers advising her to testify, falsely, that Richard Barrett had nothing to do with the formation of the new company; that the funds to purchase the Townsend assets were her own and did not come from loans; and that she had discussed with Kimberly the letter dated July 31, 1991. Reviewing the transcripts of her deposition while comparing them to her testimony at this trial reveals a large number of perjured statements. In her deposition, she falsely testified, inter alia:

(1) That as corporate secretary of TCE and MT Assembly she took care of the minute books, issued stock certificates, filed reports, and performed other corporate secretary duties.[22]

(2) That Kimberly had called her about being corporate secretary because she knew Coudriet was able to do corporate paperwork, and had worked at a corporate law firm for 4-1/2 years.

(3) That Kimberly did not have the intention of acquiring the Townsend assets.

(4) That she had no idea what was contemplated for the new corporation.

(5) That she had no dealings with Richard Barrett regarding the formation of TCE.

(6) That she got together with Kimberly to work on the bylaws.

(7) That she told Kimberly that she has access to money for investment purposes.

(8) That she started discussing acquiring the Townsend assets with Kimberly in late July or August and that she had first raised the subject.

(9) That the money used to purchase the Townsend assets was all hers and she took out no loans.

(10) That she did not know she would convey the assets to Kimberly at the time she put in the bid for them to CNB.

(11) That she had requested Kimberly write the July 31, 1991 letter.[23]

(12) That she had called Kimberly from California to inform her that she had won the bid.

(13) That she purchased the assets because she thought that they were worth a lot of money and if Kimberly could not successfully use them she would still own them.[24]

(14) That she and Kimberly had discussed what assets Kimberly could use for TCE.

(15) That she did not know Kimberly was contemplating using Richard Barrett when the leases were signed.

Kimberly Barrett also gave numerous perjured statements in her deposition, including, inter alia:

(1) That TCE did not stand for Townsend, Cleveland, and ERCO.

(2) That she did not consult with anyone when she named Richard Barrett, Rhonda Farrah, and Robert Fradette as directors, or inform them about it.

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[21] This conversation is alleged to have violated Sec. 8(a)(1) of the Act and I so find, as this conversation is coercive. No legitimate reason was advanced for asking the question, and Giannini and Rivera were not shown to be friendly or otherwise close. Significantly, since the date of the conversation, Rivera has not be called back for work, while other production workers, not former Townsend employees, have been hired. I agree with the General Counsel that the only logical reason for the call was to determine if Rivera had informed the Union about the new operation. This conversation took place after the demand for recognition was made and after the first unfair labor charge had been filed against MT. *Rossmore House*, 269 NLRB 1176 (1984).

[22] In fact, she attended only one corporate meeting and could not recall whether she prepared the minutes. Any work she did for these Companies was done in the course of her employment for David Somers.

[23] This letter requests Coudriet's assistance in locating and acquiring assets for TCE to use in serving the metalworking industries. It does not mention the Townsend assets by name.

[24] In fact, she testified at trial that she never considered herself owner of the assets, and believed Barbara Barrett and David Somers were the new owners.

(3) That no one suggested using Coudriet as corporate secretary.

(4) That she first informed Richard Barrett that he was a director of TCE in October 1991.

(5) That she first informed Richard Barrett about forming TCE in the summer of 1991.

(6) That she had no discussions with anyone except Coudriet in May 1991 about going into the engineering business.

(7) That her initial discussions with Coudriet were not related to Townsend.

(8) That she had not spoken to anyone about whether it was feasible to start an engineering business.

(9) That she never spoke to Richard Barrett or anyone else besides Coudriet about acquiring assets in the tool industry.

(10) That she had not intended to utilize Townsend machinery at TCE, but only in September decided to form another company to utilize the machinery herself.

(11) That Richard Barrett did not know he was being named as a director of MT Assembly until sometime in October 1991.

(13) That she met with various employees on October 7, 1991, at her family home.[25]

(14) That she had $1000 available in her home when she incorporated TCE.

(15) That she never had any contact with SBI herself.[26]

Richard Barrett also gave various perjured statements in his affidavits, including inter alia:

(1) That he did not know at the time that he had been named a director of TCE and did not know until he had been employed by TCE.

(2) That at the time Kimberly resigned as Townsend corporate secretary he did not know she was planning to form a new corporation.

(3) That he did not know he was named as director of MT Assembly until he signed the business consulting agreement.

(4) That he did not have discussions with Kimberly about what role he might have with regard to TCE and MT Assembly prior to the actual passing of title of the assets to TCE and MT assembly.

(5) That he had not discussed with Kimberly how the Townsend assets could be utilized prior to the purchase of those assets by TCE and MT Assembly.

(6) That he did not help in any way finance the purchase or lease of those assets.

(7) That he did not learn Kimberly was going to utilize the Townsend assets through TCE and MT Assembly until the end of September or early October 1991.

(8) That he had never discussed with Kimberly whether or not she could productively utilize the Townsend real estate assets until after he leased the Townsend facility to her.

(9) That he was not aware of the terms of the purchase of the Townsend assets until he signed the business consulting agreement.

(10) That he was unaware how Kimberly was going to finance the purchase of the Townsend assets.

(11) That he signed the business consulting agreements without knowledge as to how MT Assembly and TCE would be operating.

(12) That he had not committed to working for TCE and MT Assembly before October 9, 1991.

(13) That he did not know where the source of funds for TCE came from.

(14) That he did not learn until after MT Assembly was formed that Kimberly was involved with Coudriet in the acquisition.

(15) That he did not contribute any money to TCE.

(16) That he did not know Rhonda Farrah or Robert Fradette.

(17) That he was not involved in negotiations between Coudriet and TCE.

(18) That the date he determined to lease the Townsend facility to Kimberly was October 8, 1991, and there had been no discussions prior to then.

(19) That he did not learn Kimberly was leasing and purchasing the Townsend assets from Coudriet until October 8, 1991.

(20) That he has no supervisory duties.

Soon after they lied about essential aspects of the scheme, as counseled by Somers, the parties began to fall out. First, Coudriet, at Somers' instruction, sent a demand letter dated April 19, 1993, to Kimberly demanding partial payoff of the TCE promissory note. Curiously, right about that time Kimberly wrote two substantial personal checks to herself for back wages that she claimed came from wages she deferred beginning in June 1992.[27] She also wrote two large checks to herself for accumulated past occasions when she had used her personal funds to pay for corporate obligations. She also wrote a $1000 check to her mother at that time.

On June 7, 1993, Coudriet signed all her interests in the Townsend assets to Somers. On the last Friday of October 1993, Somers terminated Coudriet's employment with him because she had broken off her personal relationship with him. In about October or November 1993, Somers informed Kimberly that Coudriet was no longer with his law firm, and that he had asked her to sign over some documents so that he could maintain control and protect the Barretts' interests in the assets.

On January 10, 1994, however, Somers sent two letters to Kimberly Barrett, shortly before the first scheduled trial in this case. Somers notified Kimberly that Coudriet had assigned her interests to him, and he requested that she be let go of her positions with TCE/MT or else he would resign as counsel. Richard Barrett was out of the country at the time. Kimberly's reaction to Somers' action was to plead with him not to withdraw and to argue that ''having Ms. Coudriet retained as corporate secretary will lend more credibility to her involvement throughout the histories of MT and TCE. There is no doubt in my mind that removing her so close to the hearing will hurt us.'' Further she noted that ''you have just as much at stake in this as we all do.'' She wanted ''to spend 100% of our time preparing our defenses,'' and implored him to stay on: ''please let me reaffirm my opinion that we must all focus on the priority matter at hand—defense against the NLRB, first and foremost.'' (G.C. Exh. 3.) Kimberly Barrett at first denied at trial that she was concerned about maintaining Coudriet's credibility.

[25] In fact she met with them at the facility.

[26] In fact she had met with Farrah and Fradette in Somer's office.

[27] The manner in which she failed to keep any normal records of these purported back wages will be examined below. No documents that predated the payments were produced to justify such payments.

When confronted with the plain language of her letter, however, she acknowledged that she was concerned that if Coudriet was no longer employed then the story that Kimberly had previously presented, that she had, independently of Richard Barrett, approached Coudriet and gone into business with her, totally independent of any interest in the Townsend assets, would lose its credibility.

Kimberly Barrett, in a request for postponement of the hearing scheduled in January notified the NLRB of Somers' proposed withdrawal if Coudriet was not let go, and asserted that she was unable to let Coudriet go because ''she had always performed her duties as asked, and removal would be without legal justification.''

Her pleas went unheeded, and Somers withdrew as counsel. On February 14, 1994, Somers, through his own counsel, notified Kimberly that he was demanding immediate payment on the TCE lease and return of the property.[28] Somers then filed a lawsuit against TCE and MT Assembly seeking immediate payment of the promissory notes from TCE and MT Assembly given to Coudriet on October 9, 1991, as well as immediate payment on the leases and return of the property to Somers. Somers filed another complaint on April 14, 1994, seeking immediate possession of the lease properties.

In response to these complaints, the Barretts decided to, at least partially, come clean by publicly admitting that they had engaged, pursuant to Somers' advice, in a scheme to avoid outstanding liabilities and the labor laws. The Barretts and TCE/MT responded to the Somers' lawsuits with counterclaims of their own. One counterclaim sets forth a clear history of the case that was directly contradictory to the story put forth, under oath, by the Barretts in their depositions. It states that Kimberly incorporated TCE and MT Assembly pursuant to Somers' advice, and in anticipation of acquiring the Townsend assets and that Somers ''citing his expertise as a labor lawyer acquired while employed at the NLRB, advised Barrett and the Defendants, TCE and MT, that the assets must be purchased through his legal secretary, Gigette Coudriet . . . acting as a 'straw' person in order to evade Townsend successorship liability to its employees and other creditors.'' (G.C. Exh. 93(c), first count, pars. 6 and 8.) It went on to admit the role of Somers and Barbara Barrett in funding the purchase and described how Somers prepared all the various leases, agreements, and promissory notes. It seeks to void the leases and promissory notes because they were drafted by Somers ''during the course of his legal representation of Barrett, TCE and MT, solely to evade creditors and were totally unsupported by a valid consideration.''

One of their answers states explicitly that Somers ''drafted the subject note for the purpose of evading creditors and employee Union obligations.'' (G.C. Exh. 93(b), sixth special defense.)[29] Moreover, Kimberly gave a sworn affidavit supporting their defenses and counterclaims, including that Somers advised her that ''because Townsend ceased operations owing substantial sums of money to its union employees and other creditors,'' to purchase the Townsend assets through a straw person to avoid ''successorship liability.'' She further asserted that ''all the subject documents'' were drafted by Somers ''solely to evade successorship liability to Townsend's creditors.'' Moreover, she asserted that it had never been ''the intention of the parties to create and actual leasehold in connection with the assets in question.''

In a complaint against Attorney Somers, which was signed by Kimberly ''to the best of my knowledge and belief, the statements made herein are true and correct,'' Kimberly again asserted that:

> Townsend ceased operations owing substantial sums of money to its union employees. Somers therefore advised Kimberly Barrett, TCE and MT to purchase the Townsend assets through Gigette Coudriet, Somers' legal secretary, to avoid Townsend ''successorship'' liability.

She asserted further in this document that Somers had counseled her to lie under oath in her deposition before the NLRB.

The object of their counterclaims in state court is to void the various leases and promissory notes, and for TCE/MT to take possession of the disputed assets. In statements and documents filed in those cases, Kimberly appeared to come clean, and admitted the essentially fraudulent character of the scheme, and her own conscious participation in it. At trial in this case, however, she appeared to backtrack from those assertions, and asserted ignorance at the time of Somers' intent in forming two corporations. She even claimed she did not know why Somers wanted her to lie in her deposition. Instead, she incredibly attributed to what she had so recently declared her own knowledge to her new attorney, Elaine Stuhlman. I do not believe this testimony for a minute. Kimberly Barrett can claim some naivety about labor law, but her father cannot. He was the moving force behind the setting up of the scheme and knew its purposes. Kimberly Barrett had no trouble lying during the depositions given herein and I do not think she would have any trouble lying at the hearing itself if she believed it were in her best interest. I credit her statement cited above in the complaint against attorney and find that she had this knowledge throughout the history of the matters at issue.

G. *TCE and MT Assembly Are Operated Without Regard to Corporate Formalities*

The record shows that Kimberly Barrett has continued to maintain the fiction of separateness between the two companies. As noted above, shortly before the scheduled trial in August 1994, after Stuhlman began representing her, she prepared handwritten documents purporting to represent an allocation of shared costs between the two companies. Moreover, within 2 months of the trial in November 1994, she took Giannini off the TCE payroll and took Bob Hartman off the MT Assembly payroll, in another apparent attempt to establish separateness.

These actions demonstrate that the Barretts are continuing to maintain the scheme as set up by Somers. As also noted above, before any separate bank account was established for TCE, Richard Barrett had importuned his mother for $4000 in order to procure the SBI loan. Kimberly admitted that no promissory note was given and no record exists to show that the loan took place. Similarly, there does not appear to be any record of where the remaining $1000 come from. Rich-

[28] Although the document is not in the record, it appears that a similar demand was made with respect to the MT Assembly lease, as well as the two promissory notes.

[29] This defense is repeated throughout this answer, as well in another answer. (G.C. Exh. 94(b).)

ard and Kimberly Barrett testified that Richard paid part of it, but they could not, or would not, state where the rest came from.

As noted above, Kimberly did not have the $1000 in starting capital at the time TCE's incorporation, despite her representation in those incorporation papers, and in her deposition, that she did so. When she did establish an account in July 1991, it was funded with only $300 of her personal funds. Although she testified that she believed that she had reimbursed herself for that ''loan,'' she was unable to state whether any record exists to show that. Similarly, she did not have $1000 available when she incorporated MT Assembly, despite her representations in those incorporation papers, and in her deposition, that she did so. In fact, when she opened an account for MT Assembly it was after operations had commenced and was done with funds from TCE, which commenced operations at the same time. Thus, the operating funds of MT Assembly came from TCE, which itself appears to get its initial operating funds to a large extent from the accounts receivable of Townsend that were purchased from CNB.

It is undisputed that Kimberly regularly utilized her own credit cards and personal funds to purchase goods and services for the Company. Her practice in this regard was to accumulate receipts on her desk or in her pocketbook or somewhere, and reimburse herself for such accumulated receipts well over a year after some of the debts were incurred. It is to be noted that each of the checks at issue for these longstanding debts were issued in the same time period she began issuing herself checks for ''accrued wages.'' One check for office loan reimbursement was dated March 23, 1993, which the first check for accrued wages was dated April 8, 1993. On April 21, 1993, she issued one for each, including a wage payment for over $2000. This period was shortly after the depositions were taken. When pressed to explain what records she had to show that she had deferred wages, she could point only to the actual payroll sheets. She claimed that she began to defer $50 per week in June 1992 and claimed that the accrued wages she paid to herself in September 1993 represented $1000 in wages, 20 weeks at $50 per week, with tax deductions taken out. She also claimed that the second accrued wage check in April represented 60 weeks of deferred wages of $50 per week with tax deductions taken out. She further claimed that the two checks represented 80 weeks of deferred wages at $50 per week, or $4000. She claimed that she offset this $4000 against the general ledger, bringing her balance to zero. There is one basic problem with the account, besides the fact that the so-called general ledger was prepared in the summer of 1993 in order to prepare tax returns: she claimed she began to defer the $50 per week in June 1992. Between June 1992 and April 1993 there are fewer than 50 weeks. Thus, not only was there no record of a wage deferral on which to base the issuance of accrued wages to herself, even if one existed she clearly was writing herself checks for more than what had been purportedly deferred.

Another check that issued on March 23, 1993, went to her mother, Silvia Barrett, for $1000. Kimberly was unable to explain what the check was for, although she thought it might be for a ''lease.'' She claimed that her mother had bought two personal computers, one in 1991 and the other in 1992, which she subsequently leased to the Company. Kimberly was unable to state what the terms of the lease were, and described it as a very informal lease agreement in the form probably of a letter. She could not recall when it was written, when payments were made on it or where the lease was. Kimberly admitted that the purpose of the so-called lease from her mother was so that if something were to happen to the Company, if the Company were to go out of business, those computers would not be lost, and that they would be useful to have at home if the Company were to go out of business.

The Barretts began to try to create some form of records in the summer of 1993 in order to justify the first income tax returns for TCE, which were filed on July 9 and 29, 1993 respectively. The tax returns showed that Kimberly listed $5940 in deferred wages.[30] She claimed that it represented her salary during the months June through August 1991, a period during which she acknowledged there were no operations.

Furthermore, the record showed that she was amortizing organization costs of $7,839.07. She was unable to articulate the basis of these costs, and first suggested they represented her deferred salary, and then suggested the SBI due-diligence fee might be included. Moreover, she also claimed to have reimbursed herself for the $5940 in accrued wages. The tax returns filed for TCE for the fiscal year 1992, the period being September 1, 1991, through August 31, 1992, show a deferred compensation figure of $8190. She claimed this represented the deferred compensation for her father at $100 per week and for herself at $50 per week, since June 1992 as well as the deferred wages from January 1991.

She then testified, however, that she had not yet paid herself back for the summer of 1991 when asked to explain what records she had to account for these various deferrals and payments of wages. She claimed she had ''yellow lined pieces of paper'' that were kept on loose sheets in a manila folder that showed such deferrals. She was unable to locate these notes, however, before trial. She claimed she used them to create the general ledger. Despite the claims that such notes once existed, however, and were used to create the general ledger in the summer of 1993, she admitted she had failed to produce such notes pursuant to subpoena at her deposition. Moreover, she admitted that during the summer of 1991, there were no operations, only a ''corporate shell'' and she had not determined a salary for herself. She explained that once operations started in October 1991 she decided that her salary would be based on what she could pay, and she decided to pay herself for the period that the Company was not in operation.

H. *TCE and MT Assembly Are Alter Egos of One Another and Constitute a Single Employer*

An alter ego relationship may be found when two nominally separate entities share substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. *Advance Electric*, 268 NLRB 1001, 1002 (1984); *Crawford Door Sales*, 226 NLRB 1144 (1976). Unlawful motivation is an additional factor frequently considered in determining whether alter ego status

[30] She also listed $900 in accrued compensation, which apparently reflected Coudriet's $300-per-month salary.

exists. The Board has also held it is not necessary to have all such factors present before an alter ego finding is made.

With respect to TCE and MT Assembly, all factors pointing to an alter ego relationship are present. Moreover, it is clear that MT Assembly was created to avoid any successorship claim that might be made. Respondents have admitted this in pleadings filed in other forums as noted earlier. Its lame argument that MT Assembly was created to somehow shield assets of TCE from a products liability lawsuit does not stand up. TCE sells the product that MT Assembly makes for TCE alone. Any products liability lawsuit would sure target TCE and would likely target MT Assembly as well. The experience of the Comtec Companies on this point is enlightening. All such Companies were saddled with the payment of the products liability of one, though the individual Comtec Companies were not related in any way but ownership.

MT Assembly and TCE have common ownership and top management and shared some employees at lower management levels, at least until this trial was scheduled. As MT assembly produces the product sold by TCE on the same premises occupied by TCE, they obviously share a common business purpose and ultimately common customers. The machinery used is common to both and the little if any attempt was made, again until the specter of this trial arose, to allocate common expenses between the companies. I find that TCE and MT Assembly are alter egos of one another.

TCE and MT Assembly also constitute a single employer. The record contains all the indicia to support a finding of single employer. In analyzing whether a single-employer relationship exists between two nominally separate entities the Board considers whether there is an interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965); *Wisconsin Education Assn.*, 292 NLRB 702, 711 (1989); *Thornton Heating Services*, 294 NLRB 304, 309 (1989). Moreover, a principle issue is whether the dealings between two nominally separate companies are done at ''arm's-length.'' *Ironworkers Local 15*, 306 NLRB 309 (1992); *Blumenfeld Theaters Circuit*, 240 NLRB 206, 215 (1979).

Kimberly Barrett, who is president and chairman of the board of each corporation, and her father, Richard Barrett, who is a director and business consultant to each, clearly run both companies and control labor relations.[31] When operations began they together interviewed and hired the former Townsend employees. The shop superintendent, Steve Giannini, supervised the production employees and was a management person on both payrolls, as was Robert Hartman, purchasing and materials manager, up until shortly before trial. Gigette Coudriet remains corporate secretary for each Company.

The record is clear that the daily operations of the two Companies are completely integrated. The only evidence of separateness produced at trial by Respondents was that in the summer of 1994, shortly before trial, Kimberly prepared handwritten documents purporting to show an allocation of shared cost, although no actual payments for such costs were made to one another. Moreover, the facts show that whenever MT Assembly had troubles, TCE paid its bills.

Given the complete lack of any arm's-length relationship between the two corporations, the fact of common management and ownership, the functional integration of operations, and the centralized control of labor relations, the conclusion is inescapable that TCE and MT Assembly constitute a single employer.

I. *TCE/MT is a Successor Employer and it Violated Section 8(a)(5) of the Act by its Refusal to Bargain with the Union*

The current state of successorship law is set forth succinctly in *CitiSteel USA*, 312 NLRB 815 (1993), wherein the Board held:

> It has long been settled that an employer succeeds to the collective-bargaining obligation of another employer if (1) a majority of its employees had been employed by the predecessor, and if (2) similarities between those two operations manifest a ''substantial continuity'' between those enterprises. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41, 43 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972).

Here the initial employee complement of single employer TCE/MT was composed of 13 persons, all but two of which were previous employees of Townsend.[32] All employees falling within the unit description were former Townsend employees. By March 31, 1992, the date of demand for recognition, TCE/MT had 17 employees, all but two of which were former Townsend employees. Among the employees performing unit duties, five of these six employees had previously worked in the unit at Townsend. I believe the employee complement at the date of demand for recognition is representative as it has not grown appreciably and there are no plans in place to substantially increase the number of employees.[33] Thus the first requirement for a finding of successorship has been met.

There remains the question of whether the similarities between the Townsend operation and the TCE/MT operation manifest a ''substantial continuity.'' In *CitiSteel USA*, supra at 815, the Board spoke to this issue, holding:

> The factors to look to in determining whether there is substantial continuity were summarized by the Supreme Court in *Fall River*, supra at 43, as follows:
>
> > [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and

[31] Richard Barrett is paid substantially more in his role asbusiness consultant than Kimberly makes as President. He is clearly the de facto chief operating officer of both Companies.

[32] The employees were Kimberly Barrett, Gigette Coudriet, Robert Hartman, Steve Giannini, Danny Barrett, Jerzy Mroczek, Anthony Mastan, Joanne Pappas, Silvia Barrett, Richard Barrett, Beverly Newberg, Alfred Levesque, and Donald Dodd. All but Coudriet Dodd were former Townsend employees. (G.C. Exh. 59.)

[33] In 1993, there were eight employees who appear from the record to be unit employees, five whom were former Townsend unit employees.

> whether the new entity has the same production process, produces the same products, and has basically the same body of customers.
>
> These factors are to be assessed primarily from the perspective of the employees. Thus, the question is ''whether those employees who have been retained will . . . view their job situations as essentially unaltered.'' Id. quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).

There is no question but that the business of both employers is essentially the same. TCE/MT produces the same products as did Townsend, using the same facility, machinery, designs, materials, and processes as did Townsend. TCE/MT has acquired through lease and/or purchase all of the assets of Townsend, including its real property. TCE/MT serves exactly the same body of customers as did Townsend and even uses the Townsend trade names for its products. At the outset of its operations, it distributed to the public and past customers of Townsend advertising that stressed that it was carrying on the business of Townsend. The employees of TCE/MT who previously worked for Townsend perform essentially similar functions at TCE/MT, including the function of Supervisor Stephen Giannini, who supervised unit employees at both companies. The production employees at TCE/MT utilize the same job skills to perform their work as they did at Townsend, though they are called on to perform more tasks than previously. On this point, the Board in *CitiSteel USA*, supra at 815, held:

> This change means that each employee now performs several job functions which had been covered by separate job classifications at Phoenix. While we find that this consolidation of function may require employees to perform some additional tasks, each one also continues mainly to perform work he had performed for Phoenix. When employees continued to perform substantially the same work that they did for the predecessor, the addition of some new job duties is not likely to change the employees' attitude towards their job to such an extent that it will defeat a finding of continuity of enterprise. [Footnote omitted.]

If one views the successorship issue from a more negative view, the same result obtains. Although there is no single factor that will negate a finding of successorship, the Board has emphasized such combined factors as: (1) a long hiatus in the resumption of operations; (2) a difference in location of the resumed operation; (3) a changeover in the supervisory hierarchy; (4) the absence of a carryover of customers or markets supplied; and (5) a difference in the scale of the operations and the products produced, and in the methods of production. There was no long hiatus between the cessation of Townsend's operation and the beginning of operations by TCE/MT. The gap was only 2 or 3 months. The location of the operation remained the same. The supervisory hierarchy remained the same. The customers and markets supplied remained the same. There was some reduction in scale of the operations, but this has been held not to defeat a finding of successorship. See *Roanwell Corp*., 293 NLRB 20, 22 (1989).[34]

Based on the foregoing, I find that TCE/MT was a successor to Townsend and thus had an obligation to, on demand, recognize and bargain in good faith with the Union as the representative of its unit employees.[35] By failing and refusing to do so, TCE/MT violated Section 8(a)(5) and (1) of the Act.

In *Golden State Bottling Co. v. NLRB*, supra, the Supreme Court held that an employer who acquires substantial assets of a predecessor and who continues without substantial change the predecessor's business operations, can be required to remedy the predecessor's unremedied unfair labor practices if it is on notice of the predecessor's unlawful conduct.[36] There is no question in this case regarding notice as Richard Barrett, as president of Townsend, actually committed the unremedied unfair labor practices while David Somers was Townsend's attorney and Kimberly Barrett was Townsend's corporate secretary. Therefore, I find that TCE/MT are legally responsible to remedy the unremedied unfair labor practices committed by Townsend.

J. *Should Richard Barrett, Kimberly Barrett, and David Somers Be Found Alter Egos of TCE/MT and Held Personally Liable to Remedy the Unfair Labor Practices?*

The most troubling issue in this proceeding is whether anyone or any entity will be responsible for remedying the outstanding unfair labor practices. The record makes it clear that not only is Townsend effectively defunct as a an entity, but that TCE/MT operates in such a manner that it has no funds to pay the outstanding pension fund obligation set forth in the compliance specification or any other monetary liability that may result from these proceedings.

The Board will, under certain circumstances, ''pierce the corporate veil'' and hold individuals responsible as alter egos for corporate obligations. In *Riley Aeronautics Corp*., 178 NLRB 495, 501 (1969), the Board made it clear that, with respect to cases arising under the National Labor Relations Act, ''the corporate veil will be pierced whenever it is employed to perpetuate fraud, evade existing obligations, or circumvent a statute.'' Thus, in the field of labor relations, the courts and Board have looked beyond organizational form when an individual or corporate employer was in active concert or participation in a scheme or plan of evasion. (*NLRB*

[34] I am really assuming that there was a reduction in the scale of the operation based on the testimony. No volume figures are available to demonstrate this as fact, and at the end, Townsend had only three unit employees remaining, the same number as initially employed by TCE/MT.

[35] The Respondents do not question the Union's majority status among the unit employees and the Union is entitled to the presumption of continued majority support.

[36] The Respondents argue on brief that they did not acquire ''substantial assets'' of Townsend, urging that the assets purchased from CNB for $70,500 had only a fair market value of $35,000 and that the real estate held by Townsend had a market value of about $2 million. This argument ignores the fact that whatever the cost, the $70,500 paid to CNB bought virtually all the assets of Townsend, except for the real estate. And it ignores the fact that TCE/MT acquired the real estate of Townsend for nothing when Richard Barrett, in his capacity as President of Townsend, leased it to the Respondents.

v. Hopwood Retinning Co., 104 F.2d 302, 304 (2d Cir. 1939); or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay. (*NLRB v. Deena Artware, Inc*., 361 U.S. 398 (1960)); or so integrated or intermingled his assets and affairs that ''no distinct corporate lines are maintained'' (Id. at 403).

In *Metropolitan Teletronics Corp*., 303 NLRB 793 (1991), the corporate veil was pierced, and the previously unnamed Respondent owner was held personally liable (at the supplemental stage) for the entire backpay liability, based on a finding that the owner actively engaged in a scheme to evade complying with the corporation's backpay liability, as evidenced by his sole responsibility for the unfair labor practices, his intent in creating an alter ego/successor corporation, and his evasive and uncooperative behavior throughout proceedings in the face of documentary evidence that he commingled his personal and corporate funds.

It is hard to imagine being more uncooperative than the Barrett's conduct during the depositions in which they repeatedly perjured themselves, at Somers' direction, in order to hide the facts surrounding the formation of TCE/MT. Respondents have admitted in other litigation that their purpose, inter alia, was to avoid legal obligations to the Union and employees. Moreover, Richard Barrett was directly involved in the commission of all the unfair labor practices found in the underlying case, while Kimberly Barrett was directly involved in the commission of all the unfair labor practices at issue in Case 34–CA–5661. In *O'Neill, Ltd.*, 288 NLRB 1354 (1988), the Board imposed individual liability on a corporate owner based on his having, with fraudulent intent, established various alter ego companies, even though there was no evidence of commingling of personal and corporate assets, nor any apparent siphoning of corporate assets.

Thus, without more, the Barretts who conspired with Somers to set up the alter ego, and who were each involved in the commission of various unfair labor practices at issue, should be held liable as alter egos to remedy those unfair labor practices.

There is more, however, to support imposition of personal liability on the Barretts. In *Greater Kansas City Roofing*, 305 NLRB 720 (1991), the Board reiterated its willingness to pierce the corporate veil in appropriate circumstances. Noting that Section 10(c) of the Act empowers the Board with broad authority to fashion appropriate remedies to meet the needs of a particular situation so that ''the victims of discrimination may be treated fairly'' (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)), the Board stated:

> As a policy matter, the task for the Board is to determine the proper balance of the legal rights involved. When the incentive value of limited liability to corporations and their owners is outweighed by the competing value of basic fairness to parties dealing with a corporation, the Board should look past that corporation's formal existence and hold controlling individuals liable for ''corporate'' obligations. [T]he Board is not limited to piercing the corporate veil only in cases where the corporate status is used to perpetuate fraud. . . . [T]he Board may pierce the corporate veil, because justice so requires, where the individual's personal affairs and the company's affairs have been so intermingled that corporate boundaries have been effectively blurred. [Footnotes omitted, supra at 720.]

The Board noted the various factors, in addition to fraud, considered in determining whether to pierce the corporate veil:

> Among the factors to which the Board traditionally looks in ordering that the corporate veil be pierced where intermingling of individual and corporate affairs have occurred are those present in this case, the apparent under capitalization of one-person corporation; the failure to observe corporate formalities; the non functioning of officers or directors; the absence of corporate records; and the use of the corporation as a facade for the operations of the dominant stockholder. Indeed, faithfulness to corporate formalities is one of the litmus tests of the extent to which individuals actually view the corporation as a separate being. Moreover, the Board may pierce the corporate veil, because justice so requires, where the individual's personal affairs and the company's affairs have been so intermingled that corporate boundaries have been effectively blurred. Id.

In this case, the Barretts made no serious attempt to adhere to corporate formalities. The record shows that two named directors, Rhonda Farrah and Robert Fradette, had no function with TCE/MT, and were only a projected source of funding. In 3 years only one board of directors meeting was held. Moreover, the record clearly establishes that both TCE and MT Assembly were inadequately funded at their inception, and they remained profitless as corporations while the Barretts took substantial salaries out of the underfunded corporations. Richard Barrett had given himself, his family, and other management employees raises before operations began. Meanwhile, Coudriet took her lease money and gave it to Somers. She did well herself, however, as she received $300 per month to do nothing except fulfill her role as straw person.

The record shows that corporate funds were loosely held, and negligently accounted for. Kimberly Barrett continually intermingled her personal assets with the Companies' in order to pay expenses. She played games with the corporate tax records and corporate books, claiming to be owed thousands of dollars for periods in which no work was performed. Moreover, she made out checks for herself for deferred wages, but was unable to give a coherent account for the basis of these checks. Other family members were also involved in the sloppy recordkeeping. Kimberly admitted that TCE owes her grandmother $4000 for her role in seeking the SBI loan, but that no corporate record exists to show that debt. Silvia Barrett, in addition to her salary, was given at least $1000 in a nonpayroll check. Kimberly was unable to state at trial what it was for, but noted that her mother had leased certain property to TCE, including a computer purchased before operations began. The purpose of this purported lease was to avoid losing the machine to creditors.

In *Best Roofing*, 311 NLRB 224 (1977), the Board pierced the corporate veil and found that the controlling individuals of a company who were not the owners, were personally liable for the corporate unfair labor practice liability where the individuals dominated corporate affairs, and so intermingled their affairs with the corporation's that the corporate bound-

aries were effectively blurred. In particular the Board noted that the individuals failure ''to observe corporate formalities is evidenced by their failure to keep written corporate records of the amount of money loaned or borrowed between themselves'' and the corporations. Supra at 226. In this case Kimberly Barrett is an owner and Richard Barrett clearly dominated corporate affairs. The entire scheme to set up TCE/MT to continue Townsend's operation was his idea initially and he was not an owner either because of his large IRS liability and/or to hide his connection with the companies to avoid the appearance of successorship.

Based on the above factors, I find that Richard and Kimberly Barrett should be held liable as alter egos of TCE and MT Assembly. With regard to David Somers, I believe he too should be personally liable to remedy the outstanding unfair labor practices. He is the author of the scheme to circumvent the NLRA and allegedly the source of the advice to Coudriet, Richard Barrett, and Kimberly Barrett to lie about the scheme to perpetuate it. He is also asserting ownership in the Townsend assets in state court and thus was an active player in the involved scheme to avoid successorship and liability from the underlying case, personally profiting from the operations of TCE/MT.

Specifically, Somers suggested the use of Coudriet as straw person, as well as the formation of the MT Assembly alter ego, in order to shield the Barretts from unfair labor practice liability and the duty to recognize the Union. Once SBI reneged on its proposed loan, the scheme was dependent on Somers' funds. It is undisputed that Somers, through the straw person, benefited directly from his participation in the scheme, in addition to the legal fees he charged for authoring the scheme. As the record reflects, he had Coudriet assign her interest in the assets and the various notes and leases to him. As an active and benefiting participant/owner in the involved scheme, he is equally as guilty as the Barretts in the scheme to defraud the Union and the Board. His direction to the Barretts and Coudriet to lie to the Board in an attempt to hide the true facts and perpetuate the scheme adds to his culpability. I find that he is also an alter ego of TCE/MT and like the Barretts, jointly and severally liable for the unfair labor practice liabilities of *TCE/MT. Glebe Electric, Inc*., 307 NLRB 883, 886 (1967); *Evans Plumbing Co*., 278 NLRB 67 (1986); *Greater Kansas Roofing*, supra at 721.

K. *Is TCE/MT an Alter Ego of Townsend?*

As found above, TCE/MT were formed by Richard and Kimberly Barrett and David Somers to continue the Townsend operation, and with the additional purpose of avoiding Townsend's liabilities to the Union, and without the obligation to recognize and bargain with the Union or apply the terms of the expired union contract to its production and maintenance employees. Ordinarily, in order to find alter ego status, there must be a showing of some common ownership between the entities involved. Here there is no common ownership. None of the parties in this proceeding had any ownership interest in Townsend. The General Counsel asserts, however, that Richard Barrett's position of control with both Townsend and TCE/MT satisfies the ownership requirement.

At the time of the creation of TCE/MT Barrett was President of Townsend and controlled its operations. Indeed, he committed the unfair labor practices found to have been committed by Townsend. He was the person who with Somers devised the scheme to create the continuing Company, declining ownership in the new entity because of his IRS liabilities and, in my opinion, to avoid the appearance of control in the new Company. This opinion is supported by the admissions in their lawsuits, by the creation of the straw person to acquire the assets, and by their perjury to the Board. The record reflects Richard Barrett's true position with TCE/MT in the testimony that the first person suggested for the titular control of TCE/MT was Barrett's 11-year-old son. Clearly, creation and control of the new entity was to be in the hands of Richard Barrett. While creating the new Companies and seeking financing for them, Barrett hid from Townsend Owner Zimmerman his role in creating the new Company and his role in seeking to acquire Townsend's assets. He took all actions necessary, however, to insure the assets would be maintained during the period between Townsend's forced shutdown and the startup of new operations with the assets. He personally leased the Townsend facility to his new created Companies, without any consideration being given Townsend. Without the leases, the new Companies would not have been able to be operational.

He maintained his position with Townsend until everything was in place for a continued operation, then resigned from Townsend and took his consultant's position with TCE/MT, at the highest salary paid by the new Companies. Although Kimberly held the title of president, she had no experience in engineering, production, and management. As far as can be gleaned from the record, she did not manage TCE/MT, but followed the instructions given her by Richard Barrett and David Somers. I believe that Richard Barrett's control both over the operations and assets of Townsend, and then his control over the operations of TCE/MT are sufficient to satisfy the ownership test for alter ego status. See *American Pipe Concrete Pipe Co.*, 262 NLRB 1223 (1982), wherein the Board found that two employers were alter egos despite the fact that they did not ''share common ownership; nor did they, on paper, share common management or supervision.'' There, the Board found that one employer ''exercised a degree of control over [the other] so as to obliterate any separation between them.'' See also *O'Neill, Ltd*., supra; *Alaska Cummins Services*, 294 NLRB 1 (1989).

All other indicia of alter ego status are clearly present in that the TCE/MT operations were identical to Townsend in business purpose, operations, equipment, facilities, customers, and supervision of the unit employees. I find that Townsend and TCE/MT are alter egos of one another. Having so found, it follows that by disregarding its obligations to maintain the terms and conditions of employment for Townsend's unit employees, and by refusing to recognize and bargain with the Union, TCE/MT violated Section 8(a)(5) of the Act.

L. *Should Attorney's Fees and Costs Be Awarded?*

The General Counsel urges that the Board and the Union be awarded all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this case in light of Respondent's frivolous defenses, citing *Tiddee Products*, 194 NLRB 1234, 1236–1237 (1972), and its progeny.[37] I believe such an award is proper under the

[37] *J. P. Stevens & Co*., 239 NLRB 738, 770–772 (1978); *Schuck Component Systems*, 230 NLRB 838 (1977); *Fetzer Broadcasting*

circumstances of this case. There are virtually no credibility issues in this case. The only possible credibility disputes would have arisen over the question of motivation had the Barretts not admitted their perjury and had not the parties engaged in other litigation against one another. Once the true facts were admitted, and they all were in documentation and pleadings filed in state court before this trial began, there is no defense to the allegations of the complaint. It is admitted in various pleadings and averments of fact in this record that creation TCE/MT and the use of the straw person Coudriet were all part of a plan to disguise the continuance of the business of Townsend to avoid the unfair labor practice liabilities of Townsend and the obligation to recognize the Union as the representative of the unit employees.

The disguise might have worked had the Barretts and Coudriet not admitted their perjury and had the parties not fallen out and sued one another. To reward such deceit and such disdain for the Act, the Board, and its processes is not conscionable in my opinion. The actions of the Respondents herein go far beyond the merely frivolous. I will recommend award of costs as requested.

M. *David Somers Should Be the Subject of a Proceeding to Show Cause Why He Should Not Be Disciplined by the Board*

The record reflects that David Somers is a former Board attorney who is knowledgeable about Board law, procedures, and ethics. The evidence adduced, if true, demonstrates that he has used his knowledge to attempt to circumvent the NLRA and suborn perjury to further that attempt. Having heard the testimony, I do not question the truthfulness of the Barretts and Coudriet with respect to their testimony that they lied at the taking of their sworn depositions at the direction of Somers. This evidence reflects that Somers holds the Board and the NLRA in total distain and likewise reflects a total lack of professional ethics. As Somers willfully chose not to appear in this proceeding, though subpoenaed to appear and named as a Respondent, I will defer any recommendation for discipline to the Board or its designated representative. I do not believe he was on notice that he would be accused of, inter alia, suborning perjury before the Board, and he should be accorded the opportunity to face his accusers and present evidence in his defense. I recommend that the Board issue an Order requiring Somers to appear and show cause why he should not be permanently barred from practicing law before the Board or otherwise disciplined for his actions as detailed in this record.

CONCLUSIONS OF LAW

1. Respondents H. P. Townsend Manufacturing Co., Inc., TCE Corporation, and MT Assembly Corporation are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents H. P. Townsend Manufacturing Co., Inc., TCE Corporation, and MT Assembly Corporation are alter egos of one another and TCE Corporation and MT Assembly Corporation constitute a single employer.

3. Respondents Kimberly P. Barrett, Richard B. Barrett, and David M. Somers are alter egos of Respondents TCE Corporation and MT Assembly Corporation.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act and has at all material times been the exclusive representative within the meaning of Section 9(a) of the Act of Respondents' employees in following appropriate unit:

> All production and maintenance employees employed by Respondents at their West Hartford, Connecticut facility but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

5. Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain in good faith with the Union as the exclusive representative of their unit employees since March 31, 1992.

6. Respondents are jointly and severally liable for payment of the sum of $36,721.43, with interest, as set forth in the compliance specification, to the Union's pension funds.

7. Respondents have violated Section 8(a)(1), (3), and (5) of the Act by failing and refusing to abide by the terms and conditions of employment for unit employees as set forth in the last collective-bargaining agreement between the Union and Townsend, as found in the Decision and Order in Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099.

8. Respondents have violated Section 8(a)(1) by coercively interrogating employees about their union activities or sympathies.

9. The unfair labor practices found to have been committed by Respondents are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, they are ordered to cease and desist therefrom and take the following affirmative action deemed necessary to effectuate the policies of the Act.

Respondents are ordered to, on request, recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of their employees in the appropriate unit. Respondents are further ordered to make their employees whole for all losses incurred by them because of the unilateral changes in wages and other terms and conditions of employment since Respondents TCE Corporation and MT Assembly Corporation commenced operations, about October 22, 1991. Backpay should be computed in accordance with the Board's formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondents should make whole the applicable union funds for its unit employees, with interest, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Respondents are jointly and severally liable for the sums owed by virtue of the foregoing, and for the moneys owed the Union's pension fund as set forth in the compliance specification, incorporated by reference. Respondents should further be ordered to reimburse the Board and the Union for all

Co., 227 NLRB 1377 (1977); and *Hecks, Inc.*, 215 NLRB 765 (1974).

costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this case.

Based on these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[38]

ORDER

The Respondents, H. P. Townsend Manufacturing Co., Inc., TCE Corporation, and MT Assembly Corporation, West Hartford, Connecticut, their officers, agents, successors, and assigns, and Kimberly P. Barrett, Richard B. Barrett, and David M. Somers, individuals, shall

1. Cease and desist from

(a) Failing and refusing to recognize the Union as the exclusive representative of their employees in the appropriate unit:

> All production and maintenance employees employed by Respondents at their West Hartford, Connecticut facility but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

(b) Failing and refusing to abide by the terms and conditions of employment for unit employees as set forth in the last collective-bargaining agreement between the Union and Townsend, as found in the Decision and Order in Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099.

(c) Coercively interrogating their employees about their union activities or sympathies.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Recognize, and on demand, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees and, if agreement is reached, embody the agreement in a new collective-bargaining agreement.

(b) Rescind any unilateral changes made in the terms and conditions of employment from those set forth in the last collective-bargaining agreement between the Union and H. P. Townsend Manufacturing Co., Inc., and reinstate those terms and conditions of employment with respect to current unit employees.

(c) Make whole those unit employees employed since the operations of TCE Corporation and MT Assembly Corporation commenced about October 22, 1991, for any losses they may have suffered by the Respondents' failure and refusal to abide by the terms of former collective-bargaining agreement, in the manner set forth in the remedy section of this decision.

(d) Pay to the Union the pension fund obligation for the involved individuals as set forth in the compliance specification in Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099, with interest.

(e) Pay to the Board and the Union all costs and expenses incurred in the investigation, preparation, presentation, litigation, and conduct of this proceeding.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at their West Hartford, Connecticut facility copies of the notice required by the Board's Order in Cases 34–CA–4196, 34–CA–4913, and 34–CA–5099, and the notice appended to this Order marked ''Appendix,''[39] Copies of the notice, on forms provided by the Regional Director for Region 34, after being duly signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing, within 20 days, what steps the Respondents have taken to comply with this Order.

(i) Respondent David M. Somers must show cause, in writing, within 30 days of the date of this Order why he should not be permanently barred from the practice of law before the Board, or otherwise disciplined by the Board for his conduct in this proceeding.

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[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided by Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''